

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-847

JAMES H. TANAKA,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

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No.

JAMES H. TANAKA,

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THE UNITED STATES,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

Petitioner prays that a writ of certiorari be issued to review the decision of the United States Court of Claims entered on October 1, 1976.

OPINIONS BELOW

There were no formally-reported opinions by the Court of Claims, other than the ORDER of October 1, 1976, and the ORDER with a summary opinion granting defendant's motion for summary judgment, entered on June 11, 1976. Both of these ORDERS are printed in their entirety in APPENDIX A, *infra* p. 1a and APPENDIX B, *infra* pp. 2a-4a. The administrative decision of the Air Force Board for the Correction of Military Records, identified as SAFCB 73-3209, dated May 12, 1975, which precipitated the litigation in the Court of Claims, is reproduced as APPENDIX C, *infra* p. 5a.

JURISDICTION

The judgment of the United States Court of Claims, printed in Appendix A hereto, was entered on October 1, 1976. This Court has jurisdiction under 28 U.S.C. Sec. 1255(1).

QUESTIONS PRESENTED

1. Whether an Air Force member on continuous active duty for more than twenty (20) years, with an outstanding performance record, numerous awards and decorations, is denied "due process" when he is refused an opportunity to appear in person before any forum, administrative or judicial, to challenge the accuracy of three prejudicial and racially-biased officer effectiveness reports which destroyed his 14½-year career as an officer?

2. Whether the Air Force Board for the Correction of Military Records acted arbitrarily and capriciously by glossing over voluminous documentary evidence of record, made

under oath, supporting petitioner's allegations of inaccuracy, prejudice, vindictiveness and racial bias of the rating officer, by acting in secret and denying petitioner a hearing on the merits?

3. Whether under the circumstances the Court below abused its discretion in dismissing plaintiff's petition on defendant's motion for summary judgment absent any supporting affidavit and without oral argument?

CONSTITUTIONAL PROVISION, STATUTE, AND EXECUTIVE ORDER INVOLVED

The constitutional provision involved is the "due process clause" of the Fifth Amendment to the Constitution. The federal statute concerned is that portion of 10 U.S.C. 1552, pertaining to the administrative correction boards for the armed services. The Executive Order, No. 9981, signed by the President on July 26, 1948, as Commander-In-Chief of the Armed Forces, assures equality of treatment and opportunity for members of the armed services without regard to race, color, religion or national origin. The applicable portion of the Fifth Amendment, and the statute and the Executive Order are reproduced in the Appendix.

STATEMENT OF THE CASE

The jurisdiction of the Court of Claims was invoked because petitioner had exhausted his administrative remedies through the Air Force Board for the Correction of Military Records without redress.

This is an action by an active-duty enlisted man to review the dismissal, in the court below, of his petition to be permitted to present under oath the available evidence

to establish the error and injustice visited upon him by the prejudicial and racially-biased effectiveness reports by a military rating officer.

The Correction Board, relying on three unsworn, routine-form effectiveness reports made by raters whose motives are suspect ignores compelling documentary evidence to the contrary, all of which is under oath, from respected, senior military officers in a position to know the facts in dispute.

Further, these effectiveness reports, in addition to being inaccurate and unjust, are misleading in at least two additional respects. First, they directly contradict the oral assurances made repeatedly by the rater to the petitioner that he "was doing an outstanding job" (App. E, pp. 11a and 12a). Second, while these reports purport to compliment the officer in narrative form, they actually foreclose any promotional consideration with a "low" numerical score, the controlling rating factor.

To further prejudice petitioner, he was not in a position to learn of this deception and unfairness in rating until considerably "after the fact," since being overseas, he had no access to the reports.¹

Despite repeated efforts and voluminous documentary evidence, made under oath, and requests for a personal hearing before the AFBCMR during the last five years, petitioner has been unable to have anyone, anywhere, anywhere place examine in an open forum, the merits of the issue in dispute. The Correction Board, ignoring requests for

¹ The practice now permits officers stationed overseas and unable to visit AF Hqs. in person to review their records, to purchase copies of all such ratings.

a personal hearing where he could be heard along with senior Air Force officers familiar with the facts and appearing at their own expense, dismissed the application with only a routine letter. The court below, in granting defendant's motion for summary judgment, absent even one supporting affidavit and without oral argument by counsel, exacerbates the injustice and denies petitioner due process and leaves him totally without remedy except to this Court.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and fundamentally-important questions of Due Process under the Constitution.

1. It has a far-reaching impact on a broad segment of society. The Veterans Administration currently reports there are 29.5 million veterans of the Armed Services. While it is impossible to state with accuracy the precise number of present and former service members who are or have been the victims of arbitrary and capricious administrative action by intemperate, hostile and prejudiced military or naval superiors, where the individual's property rights, entitlement to benefits, disability ratings, retirements, etc., have been adversely affected, their number is significant. It could literally affect thousands of service members who are faced with the futility of seeking administrative redress.

2. The administrative procedures available to present and former service members through the military correction

boards,² while lauded by the services, are unnecessarily frustrating, and where meaningful redress is sought, disappointingly rare.³

3. The federal courts, including the court below, have lacked uniformity, and as far as can be determined, this Court has not directly considered the issues presented by this case.⁴

4. It challenges the eloquence of this Court in decisions over the years, all of which address the basic con-

² To date, in 1976 alone, the Army advises they have received approximately 10,000 applications for correction of records under 10 U.S.C. 1552. The Navy total for the year is 5,819, as of 14 December. The Air Force declined to reveal the number of applications received. However, it can be estimated that a minimum of 20,000 service members, current or former, have applied to the various correction boards for the three Services during 1976 alone.

³ An interesting admission by the service correction boards is reported in 83 Yale L.J. 33 (1973), found at Page 41, footnote 57, concerning reinstatement: "Reinstatement, however, is almost never given. In the Army it is estimated that 'less than 1% of the cases involved direct reinstatement' . . .". "The Air Force makes the policy more explicit: 'Reinstatement is not generally granted except in instances where the reason for discharge is invalidated and the member has only a short time until retirement.'" In considering the Navy position, the following is quoted: "The number of cases brought before the Navy Board for Correction of Naval Records where the petitioner asks for and obtains reinstatement 'is very small.' Again it is a remedy generally limited to those close to retirement." In each case the Yale Law Journal has on file the original letters from the Executive Secretaries of each of the Services, dated 11, 7, and 10 May 1971, respectively.

⁴ See: "The Justices And The Generals: The Supreme Court And Judicial Review Of Military Activities", reported in the Military Law Review, Volume 70, Headquarters, Department of the Army, Fall 1975, Page 1, *et seq.*

cept of due process. In *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951), in a concurring opinion by the late Justice Frankfurter, at Page 168, the following appears:

"Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. (Citations omitted) And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal."

At Page 170, the opinion continues:

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

Continuing at Page 171:

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights, at least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely

depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government that justice has been done."

In *Greene v. McElroy*, 360 U.S. 474, 496 (1959), this Court stated:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots." [Citing, Volume V, *Wigmore on Evidence* (Chadbourn rev. 1974), Sec. 1365]

In *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), in an opinion by Justice Stewart, speaking for the Court, stated:

"A fundamental requirement of due process is the opportunity to be heard. (Citing *Grannis v. Ordean*, 234 U.S. 385, 394). It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

In *Boddie v. Connecticut*, 401 U.S. 371, 378, 379 (1971), the Court said:

"Due process does not, of course, require the defendant in every civil case actually have a hearing on the merits. * * * What the Constitution does require is an opportunity * * * granted at a meaningful time and in a meaningful manner (citing *Armstrong v. Manzo*, *supra*) * * * for a hearing appropriate to the nature of the case. The formality and procedural requisites for a hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

"In short, within the limits of practicality, a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the premise of the due process clause."

While none of the above-cited opinions of this Court is represented to be substantially similar to the facts consid-

ered or the decision rendered, the expressed principles of due process present the Court with an opportunity to address a problem of significant and increasing concern to a major segment of our society, many with military or naval services' grievances.

The instant petition clearly illustrates the injustice existing in the present interpretation of "due process" by the military correction boards whose indifference to the rights of the individual service member threatens to destroy the fabric of a democratic society.

The oft-cited caveat that "somehow military expertise is singularly reserved to military officers and officials," does a disservice to a major share of our citizenry (many of whom have answered their Country's call in time of need) and who are equally capable of determining what is and what is not "due process" under our Constitution and system of law. Such "military expertise" can easily become a screen to shield the administrative and bureaucratic abuses inherent in a system allowed to become a power to themselves.

What is urged by this petitioner, speaking for himself and countless others, is a definitive ruling by this Court as to precisely what "due process" is as it applies to the Armed Forces.

5. The petition places in sharp focus the abuse by military rating officers (who avoid confronting the petitioner and testifying under oath) by denying a minority-member of the Armed Forces the rights guaranteed by Executive Order No. 9981.

Finally, it establishes that judicial review by this Court is imperative to insure that the principles common to our

traditional heritage, as set forth in the Constitution, federal statute and case law remains inviolate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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December 1976

1a

APPENDIX A

IN THE
UNITED STATES COURT OF CLAIMS

JAMES H. TANAKA

v.

No. 330-75

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, NICHOLS and KUNZIG,
Judges.

ORDER

This case comes before the court on plaintiff's motion, filed June 25, 1976, pursuant to Rules 7(d) and 151(b), for reconsideration *en banc* and a trial on the merits. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the six active Judges of the court (Judge Kashiwa not participating in this case) as to the suggestion for reconsideration *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for reconsideration and a trial on the merits under Rule 151(b).

IT IS ORDERED that plaintiff's said motion, filed June 25, 1976, be and the same is denied.

BY THE COURT

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

October 1, 1976

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

JAMES H. TANAKA

v.

No. 330-75

THE UNITED STATES

Carl J. Felth, attorney of record for plaintiff. *Kinji Kanazawa*, of counsel.

Stephen G. Anderson, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, NICHOLS and KUNZIG, *Judges*.

ORDER

In this military pay case, before us on defendant's motion for summary judgment, the controlling issue is whether the Board for Correction of Military Records (BCMR) was arbitrary and capricious in not correcting the record of the plaintiff. He was an Air Force Captain who was twice passed over for promotion by Selection Boards and was thereafter removed from active service under 10 U.S.C. Sec. 8303. Plaintiff says that three OER's should have been removed from his file as they were erroneous and unfair, whereupon the passovers should have been voided. He submitted two mitigating letters asserting that in ret-

rospect the writers, who had been rating officers, had rated plaintiff too low. They did not, however, point out any misstatements of fact in their original OER's only opinions they no longer entertained. The OER's were not harshly critical, but just rated plaintiff lower on some factors than he needed for selection at the time the Selection Boards met. An Officer Personnel Review Board had refused to add these letters to plaintiff's file or remove the challenged OER's. The BCMR, thrice applied to, found no evidence of error or injustice in the case.

The reasons are obvious and need not be stated, that might cause a careful finder of fact to attach more weight to an original OER than to a subsequent attempt by its writer to modify it as to matters of opinion only. It is not for us to substitute our judgment for that of the military, in evaluating this kind of evidence.

Ratings and promotions are discretionary matters. We must not interfere with the internal affairs of the military unless there is a showing of clear error, abuse of discretion, or arbitrary and capricious action. *Boyd v. United States*, 207 Ct. Cl. 1 (1975); *Dorl v. United States*, 200 Ct. Cl. 626, *cert. denied*, 414 U.S. 1032 (1973). By this standard, the matters the plaintiff complains about fail to tender a triable issue of fact.

Defendant's motion also asserts laches, but the above conclusions make it unnecessary to address that issue.

Accordingly, on defendant's motion, and on consideration of the record and briefs of counsel, but without oral argument, it is ORDERED, that the defendant's motion

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for summary judgment is granted and the petition is dismissed.

BY THE COURT

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

June 11, 1976

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APPENDIX C

SAFCB 73-3209

12 May 1975

Dear Sergeant Tanaka:

Reference is made to your request for correction of your military records under the provisions of Section 1552, Title 10, United States Code (70A Stat. 116).

The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provides that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.

I regret to advise you that a careful consideration by the Board of your military records, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. However, you are privileged to submit new and material evidence for the consideration of the Board. In the absence of such additional evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

BY DIRECTION OF THE CHAIRMAN:

M. T. MARTIN
Executive Secretary
Air Force Board for the
Correction of Military Records

SSgt James H. Tanaka, FR183-26-1691
Box 26784
APO San Francisco 96230

cc: Carl J. Felth, Esq.
810 18th Street, N.W., Suite 805
Washington, D.C. 20006

APPENDIX D

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

* * *

STATUTE AND EXECUTIVE ORDER INVOLVED

Title 10, U.S.C. § 1552(a)

* * *

§ 1552. Correction of military records: claims incident thereto.

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

* * *

Amendments

1960 — Subsec. (f). Pub. L. 86-533 repealed subsec. (f) which required reports to the Congress every six months with respect to claims paid under this section.

Title 3 — The President

EXECUTIVE ORDER 9981

ESTABLISHING THE PRESIDENT'S COMMITTEE ON EQUALITY OF TREATMENT AND OPPORTUNITY IN THE ARMED SERVICES

WHEREAS it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, by the Constitution and the statutes of the United States, and as Commander in Chief of the armed services, it is hereby ordered as follows:

1. It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.

2. There shall be created in the National Military Establishment an advisory committee to be known as the President's Committee on Equality of Treatment and Opportunity in the Armed Services, which shall be composed of seven members to be designated by the President.

3. The Committee is authorized on behalf of the President to examine into the rules, procedures

and practices of the armed services in order to determine in what respect such rules, procedures and practices may be altered or improved with a view to carrying out the policy of this order. The Committee shall confer and advise with the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, and shall make such recommendations to the President and to said Secretaries as in the judgment of the Committee will effectuate the policy hereof.

4. All executive departments and agencies of the Federal Government are authorized and directed to cooperate with the Committee in its work, and to furnish the Committee such information or the services of such persons as the Committee may require in the performance of its duties.

5. When requested by the Committee to do so, persons in the armed services or in any of the executive departments and agencies of the Federal Government shall testify before the Committee and shall make available for the use of the Committee such documents and other information as the Committee may require.

6. The Committee shall continue to exist until such time as the President shall terminate its existence by Executive order.

HARRY S. TRUMAN

THE WHITE HOUSE

July 26, 1948.

* * *

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS

JAMES H. TANAKA,)	
)	
<i>Plaintiff,</i>)	
v.)	No. 330-75
)	
THE UNITED STATES,)	
)	
<i>Defendant.</i>)	

PETITION

TO THE HONORABLE,
THE UNITED STATES COURT OF CLAIMS:

THE PETITIONER ALLEGES:

1. The jurisdiction of the Court in this case is based on 28 U.S.C. 1491.

2. That he is a citizen of the United States and a resident of the State of Illinois.

3. That this is a claim for pay and allowances as an officer on active duty in the United States Air Force from 30 March 1971 to current date.

4. That he is an American of Japanese ancestry, born in San Luis Obispo, California on 20 December 1933, who until the age of eight years lived with his family, father, mother, one brother and two sisters, on a farm in California.

5. That early in 1942, he along with his recently-widowed mother, brother and two sisters, were interned under Ex-

ecutive Order 9066 at the Santa Anita Racetrack in California, where they lived in stables until more permanent facilities were constructed at Rhower, Arkansas.

6. That the family's personal property was confiscated and for four years, he, along with his family, lived a marginal existence behind barbed wire fencing, under search lights and a 24 hour guard surveillance until released from internment camp at the end of World War II, following which the family moved to Philadelphia for a new start in life.

7. That he attended public school, graduated No. 1 and was president of his class in junior high school, graduated with honors from the leading high school in Philadelphia, winning a full four years' scholarship to the Florida State University.

8. That he actively participated in the Air Force ROTC program all four years in college, winning a Second Lieutenant's commission on graduation in 1955. He received his Masters' degree in Education and at the time he was called to active duty in late 1956 he was doing graduate work toward his Doctorate degree at Florida State University.

9. That ordered to active duty as a Second Lieutenant in the Air Force Reserve on 26 September 1956, he served continuously as an officer, being promoted through to the grade of Captain at the time he resigned his regular Air Force commission effective 30 March 1971.

10. That on 6 October 1970, he was formally notified that since he had twice been considered and not recommended for promotion to the permanent grade of Major, his removal from the active list was mandatory under the law, not later than 31 March 1971.

11. That considering the options available to him he, on 10 November 1970, elected to tender his resignation of his regular Air Force commission and enlist in the Regular Air Force in the grade of Sergeant (E-4), foregoing the opportunity to collect severance pay in the amount of \$15,000.00, to seek administrative redress. Promoted to Staff Sergeant (E-5) and selected for promotion to Technical Sergeant (E-6), reflects exceptional promotion progress.

12. That at issue is the validity, justice and fairness of three (3) officer effectiveness reports, rendered over a two-year period by two officers who mislead him and unjustly rated him thereby directly causing his removal from the active list for failure of promotion with his peers.

13. That at the time these three (3) questioned effectiveness reports were rendered, i.e., April 1964 through June 1966, being stationed overseas and without opportunity to personally review his performance ratings, he had no possible way to learn of their prejudicial effect on his career as a regular Air Force officer until well after the fact at which time it was too late to undo the damage to his chances for promotion.

14. That in lieu of personally reviewing these three (3) reports, he relied on the verbal assurances of his then two rating officers that he was performing his duties in an "outstanding" manner.

15. That these three (3) challenged effectiveness reports cover a period during which plaintiff was serving as a Training Advisor to the Japanese Air Self Defense Force (JASDF) in the Military Assistance Advisory Group - Japan, an assignment for which he was uniquely qualified. He had been specifically selected by name for this assignment; he had just

concluded a successful four-year teaching career training an elite group of young cadets and future regular officers at the Air Force Academy so that training young Japanese officers to assume positions of leadership in the JASDF was neither strange nor foreign to his experience capability; he had graduated from the Military Assistance Institute in Washington, a State Department sponsored training course; he was fluent in the Japanese language; and he had previously served a tour in Japan which had been cut short to permit him to be individually-recruited for assignment as a faculty member of the prestigious first group of staff selected for the new Air Force Academy at Colorado Springs.

16. That following a significantly successful four-year tour as a staff and faculty member at the Air Force Academy he was promoted to Captain. He was twice offered an unsolicited tender of a Regular Air Force Commission (accepted in 1963), and was individually invited by the Superintendent to extend his tour at the Academy for an additional two years. Here he had earned an "Exceptionally Fine" effectiveness rating personally endorsed by the Academy Superintendent (translated to a numerical rating of "8"), and was awarded the Air Force Commendation Medal for conspicuously meritorious service for the period from May 1960 to May 1964. Arriving at his new station at MAAG-Japan in mid-1964, he was a dedicated and highly motivated officer eager to continue his chosen professional career.

17. That during his two (2) years as a training advisor under the Chief, Plans and Training Division, a long-time in-grade, discontented Lieutenant Colonel who openly ridiculed the Japanese people and detested his assignment to Japan, plaintiff was the unfortunate victim of a subtle form of racial discrimination practiced by an unscrupulous and

unprincipled senior, working through a subordinate. This prejudiced plaintiff's chances for promotion and terminated his professional military career as an officer in the Regular Air Force.

18. That the Chief, Plans and Training Division, was in a unique position to unduly influence plaintiff's rating since, in addition to officially endorsing plaintiff's rating, he personally rated the senior training advisor who in turn rated plaintiff. As both were Lieutenant Colonels in contention for promotion to full Colonel, the Chief's influence was considerable.

19. That plaintiff as a Captain and his rating official as a Lieutenant Colonel worked together in a small, closely-knit duty section under the immediate supervision of the Chief, Plans and Training Division. Both were classified as training advisors. Both performed the identical duties with the major share of these duties being performed by the plaintiff and for which the Lieutenant Colonel claimed credit by intercepting written as well as verbal commendations by senior JASDF officers expressing their appreciation to plaintiff for his outstanding contribution to the success of the training mission working directly with the JASDF.

20. That plaintiff's obviously highly-successful accomplishment of duties on behalf of the training section and his rapport with senior American staff officers at MAAG-Japan, as well as the JASDF officers of General rank, all of whom were impressed with plaintiff's outstanding performance of duty, was resented by the senior training advisor manifesting itself in a number of incidents reflecting his personal pique and adversely affecting plaintiff's effectiveness ratings.

21. That plaintiff's rating official on his first two (2) questioned effectiveness reports, working under the direc-

tion and guidance of the Chief, Plans and Training Division, unjustly and unfairly rated plaintiff so as to preclude any chance for promotion, an admission officially confirmed in letters dated 27 December 1968 and 17 March 1969, setting forth in specific detail what the true and correct ratings should have been. The rater by this time had been promoted to the rank of full Colonel and was out from under the direct influence of the former Chief, Plans and Training Division.

22. That following the senior training advisor's promotion to full Colonel over the rank of the Chief, Plans and Training Division, and his transfer to a stateside position commensurate with his new rank, plaintiff was advanced to the duty of Senior Training Advisor with sole responsibility for the duties he had previously shared with the Lieutenant Colonel. Again, plaintiff was verbally assured by the Chief that he was doing an "outstanding" job. Plaintiff had no reason to believe otherwise.

23. That after a year's conspicuous performance of duty as the Senior Training Advisor, plaintiff was unanimously recommended by the senior Air Force staff officers at MAAG-Japan to the new Chief of the Mission, and Air Force General officer, as the outstanding candidate for appointment to the General's personal staff. Based on that recommendation by the senior Air Force staff, plaintiff was unquestioningly selected by the new head of the Mission, a selection the General never had occasion to regret. Plaintiff served in this position for two (2) years earning successively-outstanding ratings, rated and endorsed by General officers.

24. That plaintiff's third questioned rating, i.e., for the period from 19 July 1965 through 30 June 1966, from the Chief, Plans and Training Division, is neither

consistent with the Chief's repeated verbal assurances to plaintiff that "he was doing an outstanding job," nor with the unanimous recommendation of the senior Air Force staff officers at MAAG-Japan made to the new Chief, an Air Force General officer. Obviously, the Chief of the Plans and Training Division (and plaintiff's rating official on the third questioned report) was included in the unanimous recommendation by the senior Air Force staff made to the new Chief of the Mission, as to the "outstanding" qualifications of plaintiff.

25. That considering his highly successful career from 1960 to 1964 at the Air Force Academy and his outstanding record from 1 July 1966 through to resignation on 30 March 1971, his three (3) questioned ratings over a two-year period from mid-1964 to 30 June 1966, are totally out of character with plaintiff's temperament and performance of duty pattern in the military service dating back to his original commission in the Air Force ROTC in 1955.

26. That beginning with his new assignment as the Aide-de-Camp to the Chief of the Mission at MAAG-Japan on 1 July 1966, he earned two (2) consecutive "outstanding" effectiveness reports, both rated and endorsed by General officers. This began an unbroken series of "outstanding" ratings which continued uninterrupted through his remaining career as an Air Force officer for a total of seven (7) consecutive "9's," the highest rating obtainable. His performance record as an enlisted man from early summer of 1971 through to present date, is equally impressive. Despite the emotional trauma of losing his regular commission, being reduced to serving the Air Force as an enlisted man and meeting many of his former students from the Air Academy who are now Majors and Lieutenant Colonels (and where he himself served as an outstanding young of-

ficer), has only strengthened his resolve to correct this injustice visited upon him by the Air Force. Irrespective of specific assignment, flying, training or teaching, his performance of duty has continued to be spectacular. His ratings from superiors, personally endorsed by senior officers, are phenomenal. His enlisted duties have required mastering new air-crew skills with extensive flight-operational missions through the combat area of Southeast Asia, and have reflected the same dedicated devotion to duty evident throughout his entire 19 years of continuous active duty. His awards and decorations are strikingly persuasive. His voluntary off-duty participation in civic, educational and morale-building activities, both as an officer and as an enlisted man, has materially contributed to advancing a favorable Air Force image in the civilian and military communities.

27. That, but for the three (3) questioned effectiveness reports, plaintiff as a Regular Air Force Captain with a demonstrated record of performance of duty would have been promoted along with his contemporaries to permanent Major on his first-time consideration with the August 1968 list of successful selectees.

28. That the Air Force Board for the Correction of Military Records has thrice acted arbitrarily and capriciously in the premises to the prejudice of the plaintiff by denying him redress and/or a personal hearing with the opportunity to present a number of respected active duty and retired Air Force officers familiar with the facts to be provided at his own expense; ignored the voluminous documentary evidence submitted, including the letters of the rating official on the first two (2) questioned effectiveness reports wherein he officially admitted his errors; and superficially invited reconsideration with new and further evidence.

29. That absent the power of subpoena and discovery procedures permitted by this Court under the rules of evidence in formal litigation, plaintiff has no available means to respond to the invitation from the Air Force "to submit new and material evidence for the consideration of the Board."

30. That plaintiff has exhausted his administrative remedies and that no action on this claim, other than as stated herein, has been taken before Congress or any of the Departments of the United States, or in any court other than the petition filed in this Court.

31. That plaintiff is the sole and absolute owner of this claim herewith presented, and that he has not made any transfer of said claim or any part thereof.

WHEREFORE, plaintiff respectfully prays:

(1) That he be awarded a money judgment in an amount of \$45,000.00 more or less.

(2) That his official military records be corrected to reflect the following:

a. That his resignation of 10 November 1970, effective 30 March 1971, be withdrawn, voided and made of no effect.

b. That his regular Air Force commission be reinstated and made continuously effective from the first date of original acceptance.

c. That the three (3) questioned Officer Effectiveness Reports covering the period of his assignment as a Training Advisor at MAAG-Japan, from April 1964 through 30 June 1966, be declared null and void and removed plaintiff's selection folder and official file.

d. That the Air Force be directed to reconsider plaintiff's original promotion selection to permanent Major retroactively with the three (3) questioned Officer Effectiveness Reports withdrawn from his selection folder, thereby permitting favorable first-time consideration along with his original contemporaries by the Summer 1968 Promotion Selection Board.

e. For such other and further relief as may be appropriate.

Of Counsel:

Respectfully submitted,

KINJI KANAZAWA	/s/	Carl J. Felth
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		Telephone: (202) 638-2237
		Attorney of Record

APPENDIX F

IN THE UNITED STATES COURT OF CLAIMS

JAMES H. TANAKA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

RECEIVED

June 25, 1976

OFFICE OF THE CLERK
U.S. COURT OF CLAIMS
No. 330-75

PLAINTIFF'S MOTION FOR RECONSIDERATION EN BANC AND A TRIAL ON THE MERIT

Plaintiff respectfully moves the Court for a hearing en banc to set aside the Order entered herein on the 11th day of June 1976, and to grant a full trial on the merits on the grounds that:

(1) The judgment of the Court appears to have misconstrued, misinterpreted and failed to consider relevant, material evidence of record, made under oath, from respected, senior military officers, including a number of officers of General Officer rank, contained in the voluminous administrative record of proceedings submitted by the defendant.

(2) The judgment is wrong and represents a gross miscarriage of justice in that it denies plaintiff his Constitutional right of "due process."

(3) The Court erred in accepting at face value the self-serving administrative determination of the Air Force which is not supported by the available evidence.

ARGUMENT

Point I

The Court was misled.

It must be concluded that the Court's judgment was predicated on the self-serving, routine, form documents, none of which are under oath, which are shown in the Appendix to Defendant's Motion For Summary Judgment (Appendix A through O). This is not a true factual picture of the available evidence. It is not even a minimum sampling of the "more than 200 pages of plaintiff's record submitted by defendant in support of his motion for summary judgment."¹

On this premise, plaintiff's case was determined adversely without consideration being given to a 69 page brief of counsel, supported by an appendix of 44 documents, numbering 95 pages, over half of which are in the form of sworn affidavits and/or certified statements of senior military officers.

Referring to the Court's Order, specifically Page 2, line 2, et seq., the "two mitigating letters", presumably Appendix I and O of Defendant's Motion for Summary Judgment

¹ In Defendant's Motion For Leave To File The Administrative Record And Waiver Of Reproduction Thereof, he argues, apparently convincingly, "In view of the large number of pages in plaintiff's record (more than 200) it is requested, in the interest of economy of resources, that reproduction of said record be waived."

(neither of which is in affidavit form) are to be read in conjunction with the Indorsing Officer's affidavit of 14 September 1972 (Atch #5 to Plaintiff's Brief to the Board of September 1974) and Atchs. #42, 43, and 44 of the same brief. [See Atch #5, added]

Point II

The Plaintiff was misled.

Defendant, presumably aware of the outstanding record of the petitioner and his conspicuously successful performance of duty *before, during* and *after* the 1964-1966 period of the three challenged ratings, supported by more than *thirty* (30) affidavits and certified statements from respected, senior military officers and officials familiar with the facts in dispute, wisely elected to direct the principal thrust of his motion for summary judgment to the technical defense of laches.

In similar vein, plaintiff's response was primarily addressed to challenging the applicability of the technical defense of laches, relying on the Court to examine the sworn evidence of record and an opportunity at oral argument to stress the overwhelming testimony to directly contradict the questioned ratings.²

In the instant case the issue in question is the "validity, justice and fairness of three (3) officer effectiveness reports, rendered over a two-year period by two officers who mislead him and unjustly rated him thereby directly causing his removal from the active list for failure of promotion with his peers."³

² See affidavit of counsel added as Exhibit "B".

³ See Pages 2 & 3 of Plaintiff's Response to Defendant's Motion for Summary Judgment. See also Plaintiff's Exhibit C, added.

As this Court held in the case of *Yee v. United States*, 206 Ct. Cl. 388, 512 F.2d 1393 (1975):

"Military correction boards 'have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief'".

It is this protection plaintiff is urgently seeking of the Court to avoid a gross miscarriage of justice to a deserving Air Force member with an outstanding record of extended service in Southeast Asia during the war.

Point III

The Judgment is not supported by the evidence.

The documents from the administrative record, relied upon by the defendant (Appendix A through O), give mute evidence of any regard for:

"... an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."⁴

Out of an administrative record of "more than 200 pages submitted by the defendant, he selected 30 pages, only one of which (Appendix G) was dated *after* plaintiff's 69 page brief and 95 pages of exhibits were submitted to the correction board on 20 September 1974.

Defendant's Appendix A, dated 14 August 1973, is a "position paper" prepared by military personnel at the

⁴ *Yee v. United States*, supra.

Military Personnel Center, Randolph AFB, Texas,⁵ long before petitioner's case was painstakingly prepared and submitted to the correction board on 20 September 1974.

Defendant's Appendix I and O, discussed above,⁶ should be considered in the light of the sworn affidavits of the principals involved contained in the 95 pages of documentary evidence submitted to the board on 20 September 1974. As to Appendix O, see Plaintiff's Exhibit A added.

Defendant's Appendix J, K, and L are the questioned ratings challenged as prejudicially unjust, unfair and contrary to the verbal assurances given petitioner by the raters.

The remaining documents in defendant's Appendix appear to be routinely prepared and demonstrate little, if any, consideration by the board.

Point IV

Plaintiff has routinely been denied "due process".

At no stage has plaintiff been afforded the dignity and satisfaction of knowing his complaint of injustice has been objectively considered on its merits. The "naked" admin-

⁵ "Position Paper" is counsel's term for the recommendation of the Military Personnel Center, prepared by military staff personnel from official military records on file, following submission of DD Form 149. Experience shows this recommendation generally is adopted by the board.

⁶ See affidavit of Colonel Ellis, dated 14 September 1972, Exhibit A.

istrative denials of redress are considerably less than reassuring.⁷

As this Court most recently re-stated in *Craft v. United States*, No. 96-74, decided on June 16, 1976:

"A *naked conclusion* and mere recitation that the opinion is based upon all of the evidence without an analysis of the evidence in writing * * * is *inimical to a rational system of administrative determination and ultimately inadequate*. * * *. In these circumstances [summary and sketchy findings and reasoning by the administrative Board] we cannot give as much deference to the Board's determination as if it had given detailed finding, to support, (sic) and fuller explanations of the reason for, its conclusion." [Citations omitted]

"In a particularly egregious situation, the court may be compelled to conduct its own inquiry in order to find record support for the administrative decision. As stated in *Smith*, supra:

"* * * a disposition of the claim * * * by the * * * Board without a hearing and *without an analysis of the evidence in writing is inadequate assurance that due weight was given to all of evidence*. * * * [Citation omitted]' * * *

⁷ Analyzing the timing of the spring '71 administrative review actions, prior to plaintiff's separation on 30 March 1971, reflects a period of accelerated "RIF's" to meet reduced officer strengths, with the accompanying increase in relief applications. This seriously compromises any meaningful consideration of individual cases. Under these circumstances, three of PI's. requests were routinely rejected in a matter of weeks. Once an administrative decision has been determined adversely, it is extremely difficult to undo the damage.

"Faced with an administrative decision adverse to him, a soldier needs to be sufficiently informed of the basic grounds of that adverse decision in order adequately to appeal."

It is precisely this situation in which the plaintiff finds himself. No one will hear him in person nor any of the number of witnesses who have offered to testify in his behalf at their own expense.

What the plaintiff is urgently asking is for someone, somewhere, some place, to provide him the opportunity to be heard in his own behalf to insure that his petition for relief from a grievous wrong is examined in a fair and impartial forum.

As an officer and an airman with nearly twenty (20) years of continuous and dedicated service with no taint of anything less than top performance of duty, including numerous awards and decorations, he has earned that right.

CONCLUSION

For the foregoing reasons, as well as all matters of record herein, plaintiff respectfully prays the Court to grant his motion for reconsideration; an en banc hearing; and a full trial on the merits.

June 24, 1976

Respectfully submitted,

Of Counsel:

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Washington, D.C. 20006

Telephone: (202) 638-2237

Attorney of Record

ATTACHMENT NO. 5

AFFIDAVIT

STATE OF ALABAMA)
) ss:
 COUNTY OF MONTGOMERY)

On this *14th* day of September 1972, before me a notary public, personally appeared Frank T. Ellis, known to me to be the person, who, after being duly sworn, deposes and states as follows:

"On 5 July 1966, I indorsed an Officer Effectiveness Report, prepared by a subordinate for Captain James H. Tanaka, a junior officer serving under my overall supervision in the Air Force Section of MAAG-Japan. Unfortunately, at that time, the organization was still large enough and I was still new enough not to have known all of my officers as well as I would have liked.

As I later learned, it was a serious error on my part to have relied exclusively on the judgments of the rater in this case. Quite frankly, my confidence was misplaced and the comments attributed to me were not precisely accurate. Rather the observation credited to me was an erroneous statement, prepared for my signature, wherein I made the mistake of accepting it at face value. In a rush to complete an administrative detail within a limited time schedule and in the crush of other more pressing demands for my time and attention, I simply made a mistake.

My observations of Captain Tanaka subsequent to my indorsement and the rating I gave to the officer who rated Captain Tanaka have confirmed the error I made in indorsing Captain Tanaka's rating for the period 19 July 1965 through 30 June 1966.

On re-reading the original rating, it is clear to me that Captain Tanaka was improperly rated. Based on later observations, I consider that Captain Tanaka was competent and dedicated and the very kind of an officer the Air Force needs."

/s/ Frank T. Ellis
 FRANK T. ELLIS
 Colonel, USAF (Retired)

* * *

/s/ M. (Illegible)
 Notary Public

[SEAL]

My Commission Expires: Sept. 5, 1976.

EXHIBIT B

AFFIDAVIT

District of Columbia, ss:

Now comes CARL J. FELTH, who after being duly sworn, states:

"That he is the attorney of record in this case, working along with KINJI KANAZAWA, Esquire, of Honolulu, Hawaii, as co-counsel because of his interest in the matter.

"That on receipt of Defendant's Motion For Summary Judgment, along with a copy of Defendant's Motion For Leave To File The Administrative Record And For Waiver Of Reproduction Thereof, on or about 23 March, 1976, he made a personal visit to the Office of the Clerk

of Court shortly thereafter to examine the official file jacket, No. 330-75, James H. Tanaka v. The United States, and found it to appear to contain the administrative record of "more than 200 pages" and was satisfied that plaintiff's administrative record had been filed with the Court by the defendant, and that it was available to the Court in its entirety and could be used in oral argument at any hearing on defendant's motion for summary judgment.

"It was only at the Judicial Conference on 21 May 1976, that counsel first learned in comments to the conference by the Honorable Judge Davis, of the court's procedure for considering one-party motions for summary judgment in camera and without oral argument.

"Following the conference, affiant advised plaintiff that in all fairness he could reasonably expect that entire record, including the brief of counsel and the more than thirty (30) affidavits and certified statements of senior military officers and officials, listed in the Appendix to the brief, would be available for consideration by the Court, even though under the Rules, oral argument was discretionary with the Court.

"Further, affiant sayeth not."

/s/ Carl J. Felth
CARL J. FELTH

Subscribed and sworn to before me on this the 24th day of June, 1976.

/s/ Andrea M. Pace
Notary Public

[SEAL]

My Commission Expires: 3-31-80

EXHIBIT C

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SOLANO)

Now comes JAMES H. TANAKA, after being duly sworn, who deposes and states:

Since 1968, I have tried again and again to get an Air Force board or a court to actually hear my case. My Air Force career was destroyed by two men who wrote effectiveness reports which virtually guaranteed I would never be promoted. I can prove at a full hearing that the reports were wrong, and that they were written out of bias and personal motives. I have never received that hearing.

During the period when the OER's were written, I was repeatedly told by the officers who wrote them that I was doing an excellent job. I was unaware of the reports' content, but on the strength of what the two raters told me, plus many commendation letters from outside sources of which both they and I were aware, I assumed they were good reports. They were in fact harshly critical despite the misleading "word picture" which accompanied them. The OER system was so inflated then that anything less than an overall "8" amounted to condemnation. At the time an officer had to physically go to Randolph AFB, Texas, in order to review OER's. Since the two raters, naturally enough, did not tell me what they had done, it was not until over three years later that I found out.

After I learned the content of these three reports, I tried administrative means to challenge them. Out of

ignorance, I did so without counsel, at first, and was denied relief first by the OPRRB and then twice by the BCMR, all without any personal hearing. Later applications to the BCMR and a panel of your court, with the aid of an attorney, have been fruitless, and each of their opinions has put heavy emphasis on these earlier negative opinions. I feel that I am being punished because I lacked technical understanding of these legal processes when I first started to challenge the biased OER's.

My effectiveness as an officer was always superior, and in fact led to my receiving a Regular appointment in 1962. I am not an applicant whose continuing marginal performance or indiscretions have finally demanded his removal as an officer, but rather one whose excellent record has been marred only once, by the bias of others. That record demands more than the routine dismissals that I have so far received. It demands the one thing I have sought for over seven years to obtain — a chance to prove my claim at a full hearing.

22 June 1976
Date

/s/ James H. Tanaka
JAMES H. TANAKA

Subscribed and sworn to before me this 23rd day of June, 1976, at Travis Air Force Base, California, by JAMES H. TANAKA.

[SEAL]

/s/ Marjorie C. Johnston
NOTARY PUBLIC in and
for said County and State

MAR 14 1977

MICHAEL RODAK, JR., CLERK

No. 76-847

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES H. TANAKA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-847

JAMES H. TANAKA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former Air Force captain now serving as an enlisted man, contends that the Air Force Board for Correction of Military Records acted arbitrarily and capriciously in denying, without a hearing, his request that three unfavorable Officer Effectiveness Reports be withdrawn from his personnel file and that military decisions passing him over for promotion to major be voided.

Petitioner served on active duty as an Air Force officer from September 26, 1956, until March 30, 1971. He attained the rank of captain in the regular Air Force. From April 1964 through June 1966 petitioner was assigned as a training advisor to the Japanese Air Self Defense Force (JASDF) in the Military Assistance Advisory Group, Japan. During this period he received

three Officer Effectiveness Reports (OER's) that rated his performance somewhat lower than reports he had received in his previous duty assignments.¹

Petitioner was passed over for promotion to the grade of major by promotion boards that convened on August 27, 1969, and July 27, 1970. Having been twice considered for promotion and twice passed over, his removal from the service as an officer then became mandatory under 10 U.S.C. 8303.² To protect his accrued retirement interest, petitioner chose to resign his officer's commission effective March 30, 1971, and enlist in the Air Force as a sergeant (E-4).

Between February 1971 and May 1973 petitioner filed three successive applications with the Air Force Board for the Corrections of Military Records, requesting that the OER's for his period of service in Japan from April 1964 to June 1966 be removed from his personnel file and that his "passovers" for promotion be voided. In support he submitted two letters from rating officers suggesting that he had been rated too low,³ several "letters of appreciation," and later OER's covering his service between 1966 to 1970.⁴ The

¹On his immediately preceding tour as an instructor at the Air Force Academy Captain Tanaka had received an "Exceptionally Fine" efficiency report (Pet. App. E, p. 12a); the reports he received on this tour of duty placed him in the next lower "Very Fine" category (Government's Motion for Summary Judgment in Court of Claims, Appendices J and K).

²10 U.S.C. 8303 establishes conditions for the severance of commissioned officers who fail to achieve promotion to the ranks of captain, major, or lieutenant colonel.

³Government's Motion For Summary Judgment in Court of Claims, Appendix I.

⁴*Id.*, at Appendix B.

Board denied each application, without a hearing, finding that the facts presented failed to establish a showing of probable error or injustice in his case (*e.g.*, Pet. App. C).

Petitioner then filed this suit for reinstatement and back pay in the Court of Claims, alleging that the Board should have conducted a hearing. Petitioner also alleged that he had been a victim of racial discrimination by an unprincipled senior officer who "openly ridiculed the Japanese people and detested his assignment to Japan" (Pet. App. E, p. 12a).

After reviewing the record before the Board for Correction, the court granted the government's motion for summary judgment (Pet. App. B) and denied petitioner's motion for reconsideration *en banc* and/or a trial on the merits (Pet. Apps. A and F).

The Court of Claims correctly recognized that it has only limited authority to review military ratings and promotions, which are internal affairs of the military departments. See *Orloff v. Willoughby*, 345 U.S. 83, 93-94; *Furlong v. United States*, 153 Ct. Cl. 557, 563; *Brenner v. United States*, 202 Ct. Cl. 678, 685-686, certiorari denied, 419 U.S. 831; *Boyd v. United States*, 207 Ct. Cl. 1, 9, certiorari denied, 424 U.S. 911.

Boards for correction of military and naval records are required to conduct evidentiary hearings only when review of an applicant's available military records indicates "probable material error or injustice" that cannot be fully assessed without a hearing. *Newman v. United States*, 185 Ct. Cl. 269, 276; *Boland v. United States*, 169 Ct. Cl. 145, 151. The Court of Claims, applying the correct standard, ruled that the petitioner had "fail[ed] to tender a triable issue of fact" (Pet. App. B, p. 3a). The court noted that the two mitigating letters submitted by petitioner's former

commanding officers pointed to no misstatements of fact in the OER's but reflected only a change of opinion by those officers, and it correctly observed (Pet. App. B, p. 3a):

The reasons are obvious and need not be stated, that might cause a careful finder of fact to attach more weight to an original OER than to a subsequent attempt by its writer to modify it as to matters of opinion only. It is not for us to substitute our judgment for that of the military, in evaluating this kind of evidence.

The court's determination, specific to these facts, that petitioner's new evidence does not indicate "probable error or injustice" does not warrant review by this Court.⁵

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

⁵As the Court of Claims recently stated in a similar case (*Boyd v. United States, supra*, 207 Ct. Cl. at 12):

The fact that plaintiff has been passed over signifies no disrespect to him. His military record appears, from all the papers before us, to have been exemplary in every respect. Numerous worthy and qualified officers are passed over annually and never reach the top in their profession. They may be qualified but—in the judgment of the Secretary and the selection board vested with discretionary authority to make the promotions—may not be the best qualified of those available for the limited number of positions. The same problem can be said to confront other ambitious professional people. There are fewer rungs as one climbs toward the top of the achievement ladder.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-847

JAMES H. TANAKA,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

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Counsel for Petitioner

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-847

JAMES H. TANAKA,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

The respondent in its memorandum in opposition raises issues which require immediate clarification by the petitioner to place the substance of his petition in proper focus.

1. Respondent states a conclusion¹ which is neither supported by the record before the court below² nor the

¹ Memorandum in Opposition, p. 3, line 16 et seq.

² The administrative record submitted by petitioner to the Air Force Board for Correction of Military Records contained more than 200 pages, including more than 30 affidavits and certificates of respected senior military officers, many of General Officer rank, several of whom have volunteered to appear and testify at their own expense on behalf of the petitioner.

cases cited as authority therefor.³ This Court in *Orloff v. Willoughby*, 345 U.S. 83, 93-94, conceded that:

"We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that *there is discrimination, favoritism, or other objectionable handling of men.*" [Emphasis added]

The issue sought to be reviewed herein is the *lack of due process* denied the petitioner. For nearly six (6) years, while he has continued on active duty in the Air Force with outstanding service in a variety of operational flying assignments, including extensive duty in Southeast Asia during the Viet Nam War, *he has been denied the opportunity to be heard in any forum, administrative or judicial*, to substantiate under oath his allegation of racial discrimination by an "unprincipled senior officer who openly ridiculed the Japanese people and detested his assignment to Japan".⁴

This is not an allegation that a *scrupulous judiciary* can ignore nor permit to be characterized as "orderly government"⁵ and therefore "not to interfere".⁶ On its face this is a direct violation of Executive Order 9981 of July 26, 1948.⁷

³ The Court of Claims' cases cited by respondent are inapposite and clearly distinguishable from the facts here sought to be reviewed.

⁴ Memorandum in Opposition, p. 3, lines 7-9.

⁵ *Orloff v. Willoughby*, 345 U.S. 83, 93.

⁶ *Ibid.*

⁷ Petitioner, Appendix D, p. 7a.

2. Respondent misinterprets petitioner's purpose *in resigning his commission and enlisting as a sergeant*. His principal motivation was not "to protect his accrued retirement interest",⁸ but to continue to serve the Air Force and to seek administrative redress *working within the system*.⁹ For a native-born citizen of Japanese ancestry who had endured discrimination as a youth, this current rebuff was a matter of principle, not financial reward.¹⁰

3. The court below, on its own initiative (See Order, dated March 15, 1977, set forth verbatim in Appendix G, p. 31a, et seq.)¹¹ has introduced a series of fundamental issues, several of which are included in petitioner's "Questions Presented".¹²

While respondent determines that the court below acted correctly,¹³ the court itself, two of the three judges partic-

⁸ Memorandum in Opposition, p. 2, line 9.

⁹ Petitioner at that point in his career with 14 years of service could have accepted the \$15,000.00 severance pay to which he would have been entitled (as most released officers in similar situations do), return to graduate school to finish his studies for a doctorate degree, were he not dedicated to clearing his otherwise unblemished military record and correcting an injustice which was an affront to him. It was a matter of personal pride, dignity and honor which to him is not compensable in terms of financial reward.

¹⁰ Petition, Appendix E, pp. 9a-10a.

¹¹ To facilitate convenient reference along with the petition for certiorari, this Order has been reproduced in its entirety, identified as Appendix G and numbered page 31a et seq.

¹² Petition, pp. 2-3.

¹³ Memorandum in Opposition, p. 3, lines 16 et seq.

ipating in the decision which the petitioner seeks to have reviewed by this Court, imply that *they are not so sure*.¹⁴

The Court of Claims' admitted deep *concern* is in sharp contrast to respondent's summary dismissal of petitioner's allegation of *lack of due process*.

In the light of respondent's failure directly to address the "Questions Presented", and the court below's admitted *concern*, the need for plenary review is imperative.

For the reasons stated above as well as those set forth in the petition for certiorari, petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:

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March 21, 1977

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

No. 157-74

LARRY C. SANDERS

v.

THE UNITED STATES

Maurice F. Biddle, attorney fo record for plaintiff, *Thomas H. King*, of counsel.

R. W. Koskinen, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Before NICHOLS, KUNZIG and BENNETT, Judges.

ORDER

This case was argued March 11, 1977. The court is concerned by the number of suits by officers discharged after being passed over by Selection Boards, its uncertainty as to the best interests of the Services in the premises, as as to its own proper role. In consideration of the importance of issues raised by this case in relation to other cases now pending, (e.g., *Guy v. United States*, No. 14-75 and *Riley v. United States*, No. 206-73) the court directs

¹⁴ Petitioner's Reply Memorandum, Appendix G, p. 31a.

that within 30 days of March 11 defendant file supplemental briefs setting forth its position on each of the questions stated below. Plaintiff may file his response to the court within 30 days of defendant's filing. Other interested parties may apply for leave to submit briefs stating their positions, as amici curiae, within the time allotted.

Defendant shall address the following questions:

1. Whether a Board for the Correction of Military Records, once it has determined that an officer's effectiveness report is defective and should be removed from his file, is further obliged by law to void any prior passovers for promotion that either (a) are shown to have resulted, or (b) could have resulted from the selection board's consideration of the defective effectiveness report.
2. Whether an officer who was passed over for promotion can and must show this court, in a suit for back pay and reinstatement, that he would have been selected for promotion by his selection board but for the existence of the legal error or injustice in the course of his review by the board; and if he cannot or need not make a "but for" showing, whether he must still adduce proof meeting some alternative test.
3. Whether this court may or should assume that a Correction Board's action directing the removal of an officer's effectiveness report was based on the board's conclusion that permitting the report to remain in the selection folder would have been legal error, rather than amounting only to an injustice, in the absence of specific statement.
4. Whether there is legal error in the failure to accord an officer a promotion selection review free of defective effectiveness reports.

5. Whether *Testan v. United States*, 424 U.S. 392 (1976), rev'g 205 Ct. Cl. 330, 499 F.2d 690 (1974), forecloses this court's jurisdiction to review Correction Board decisions where the sole allegation is the board's arbitrary and capricious refusal to relieve an injustice, *Duhon v. United States*, 198 Ct. Cl. 564, 461 F.2d 1278 (1972).

6. Whether there exists any procedure by which an officer may know of adverse effectiveness reports and may challenge them prior to their consideration by a promotion selection board, and if such a procedure exists, when it took effect.

7. Whether a Correction Board has afforded a sufficient remedy for career injury caused by an improper effectiveness report, if it merely removes such report from an officer's selection file, without providing, for the information of later selection boards, any explanation of previous passovers, if any, that may have been caused by such improper report, and of gaps in the apparent service record left by the removal thereof.

8. Whether, where the court deems plaintiff deserving of relief, the remedy properly should take the form of either plaintiff's reinstatement to active duty; the court's remand of the case for further consideration by the Secretary of the branch of service concerned, or by the Correction Board for that service, or by a specially constituted selection board for that service, or by some other agency; or some other form of relief.

BY THE COURT

/s/ PHILIP NICHOLS, JR.
Judge, Presiding

Mar 15 1977